

NOTICES

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 020322065-2065-01]

Notice of Applicability of Special Use Permit Requirements to Certain  
Categories of Activities Conducted Within the National Marine Sanctuary System

Monday, May 20, 2002

AGENCY: Marine Sanctuaries Division, National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; request for public comments.

SUMMARY: In accordance with a requirement of Pub. L. 106-513, NOAA hereby gives public notice of the applicability of the special use permit requirements of Section 310 of the National Marine Sanctuaries Act to certain categories of activities conducted within the National Marine Sanctuary System. In addition, NOAA is seeking public comment on the subject of special use permits.

DATES: Comments must be received on or before July 19, 2002.

ADDRESSES: Submit all written comments to Helen Golde, National Marine Sanctuary Program, 1305 East West Highway (N/ORM6), 11th floor, Silver Spring, MD 20910.

**\*35502**

FOR FURTHER INFORMATION CONTACT: Helen Golde, National Marine Sanctuary Program, 1305 East West Highway (N/ORM6), Silver Spring, MD 20910, telephone (301) 713-3125, extension 152, email Helen.Golde@noaa.gov; or John Armor, National Marine Sanctuary Program, 1305 East West Highway (N/ORM6), Silver Spring, MD 20910, telephone (301) 713-3125, extension 117, email John.Armor@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

Congress first granted NOAA the authority to issue special use permits for the conduct of specific activities in National Marine Sanctuaries (NMSs or Sanctuaries) in the 1988 Amendments to the National Marine Sanctuaries Act (16 U.S.C. 1431 et seq.; NMSA) (Public Law 100-627). The NMSA allows NOAA to issue special use permits to establish conditions of access to and use of any Sanctuary resource or to promote public use and understanding of a Sanctuary resource. Since 1988, special use permits have been issued to persons conducting usually commercial (and

usually revenue-generating), otherwise prohibited, operations in NMSs. Such activities have included a diving concessionaire conducting trips to the USS Monitor, the filming of television advertisements, and the use of a Sanctuary for public events.

Section 310 of the NMSA allows NOAA to issue special use permits to authorize the conduct of specific activities with four conditions. The NMSA requires that special use permits:

1. Shall authorize the conduct of an activity only if that activity is compatible with the purposes for which the Sanctuary is designated and with protection of Sanctuary resources;
2. Shall not authorize the conduct of any activity for a period of more than 5 years unless renewed by NOAA;
3. Shall require that activities carried out under the permit be conducted in a manner that does not destroy, cause the loss of, or injure Sanctuary resources; and
4. Shall require the permittee to purchase and maintain comprehensive general liability insurance, or post an equivalent bond, against claims arising out of activities conducted under the permit and to agree to hold the United States harmless against such claims.

Condition 3 above tends to be the most limiting in that it prevents NOAA from issuing a special use permit if the activity may destroy, cause the loss of, or injure a Sanctuary resource. Since activities that are prohibited by National Marine Sanctuary Program (NMSP) regulations (15 CFR Part 922) usually have some adverse impact, it is generally thought that if an activity is prohibited, it should not qualify for a special use permit. While this is generally true, there are some prohibited activities that, when done in a certain way, are not likely to adversely impact a Sanctuary resource. Several of these activities are of a nature that does not qualify for other NMS permits (for example, because they are not related to research or education), but do meet the statutory conditions for special use permits. Therefore, special use permits may be issued for the narrow range of activities that are both prohibited by NMSP regulations and do not destroy, cause the loss of, or injure a Sanctuary resource when conducted in a certain way.

Section 310 of the NMSA allows NOAA to assess and collect a fee for special use permits. A special use permit fee must include each of three components. They are:

1. The costs incurred, or expected to be incurred, by NOAA in issuing the permit;
2. The costs incurred, or expected to be incurred, by NOAA as a direct result of the conduct of the activity for which the permit is issued, including costs of monitoring the conduct of the activity; and
3. An amount which represents the fair market value of the use of the Sanctuary resource.

Number 1 above essentially covers the administrative costs that NOAA incurs when it processes permit applications (including labor, printing costs, and contracts for the preparation of supporting documentation). Number 2 includes amounts to fund monitoring projects designed to assess the success or failure of the permittee to comply with the terms and conditions of the permit. It may also include money to fund a compliance monitoring program and to recoup any costs incurred by the NMSP in enforcing permit terms and conditions. Number 3 is calculated using

economic valuation methods appropriate to the situation.

In the National Marine Sanctuaries Amendments Act of 2000 (P.L. 106-513), Congress added a new requirement that prior to requiring a special use permit for any category of activity, NOAA shall give appropriate public notice. Subsection (b) of section 310 of the NMSA, as amended by Public Law 106-513, provides: "[NOAA] shall provide appropriate public notice before identifying any category of activity subject to a special use permit under subsection (a)." In addition, Public Law 106-513 gives the NMSP the authority to waive, reduce, or accept in-kind contributions in lieu of these fees when the activity does not derive a profit from the access to or use of Sanctuary resources.

This notice lists those categories of activities that have been subject to the requirements of Section 310 in the past and will continue to be in the future (unless NOAA issues a Federal Register notice indicating otherwise). All of these activities are currently prohibited by NMS regulations, and may only be permitted using a special use permit when conducted in a way that does not injure, cause the loss of, or destroy a Sanctuary resource. It is important to note that the fact that an activity is consistent with a category listed in this notice does not guarantee approval of an application for a special use permit. Special use permit applications will be reviewed for consistency with the relevant Sanctuary's management plan and regulations, the NMSA, as well as this Federal Register notice. Individual special use permit applications will also be reviewed with respect to all other pertinent regulations and statutes, including the National Environmental Policy Act. Additional categories of activities may be added in subsequent Federal Register notices, if the NMSP deems them appropriate for special use permits.

As such, the following categories of activities have been and will continue until further notice to be subject to the requirements of special use permits:

1. The disposal of cremated human remains by a commercial operator in any National Marine Sanctuary;
2. The operation of aircraft below the minimum altitude in restricted zones of National Marine Sanctuaries for commercial purposes;
3. The placement and subsequent recovery of objects associated with public events on non-living substrate of the seabed;
4. The discharge and immediate recovery of objects related to special effects of motion pictures; and
5. The maintenance of submarine cables beneath or on the seabed.

Each category listed above is further described below.

#### Disposal of Cremated Human Remains by a Commercial Entity

The NMSP has received permit applications to spread cremated human remains (i.e., ashes) over and within the Monterey Bay National Marine Sanctuary (MBNMS). Since most NMS regulations prohibit the discharge of material or other matter into the Sanctuary, this activity requires a permit. After an extensive review of the common practices involved with the \*35503 disposal of cremated human remains, the MBNMS determined that no detectable negative impacts to NMS resources and qualities were expected to result from the practice when certain conditions are adhered to by

those engaged in the activity.

Conditions placed on this activity that eliminate negative impacts to Sanctuary resources include: restricting the minimum altitude of any aircraft used to facilitate the spreading of the ashes; prohibiting the use of any plastics or any other toxic material associated with the remains; and requiring that the remains be sufficiently incinerated.

In 1998, the superintendent of MBNMS issued an authorization (authorization number MBNMS-03-98) of the U.S. Environmental Protection Agency's (EPA) general permit for burial at sea (40 CFR 229.1). This authorization allows anyone (commercial entities as well as private individuals) to discharge cremated human remains in the MBNMS without first requesting a permit (subject to special conditions such as those described above). This authorization does not authorize anyone to conduct any activity otherwise prohibited by the MBNMS regulations except the discharge of cremated human remains (e.g., this authorization does not allow a person to operate an aircraft below 1,000 feet in one of the restricted overflight zones during the course of discharging cremated human remains). If an individual engaged in the disposal of cremated human remains wished to conduct an additional otherwise prohibited activity (e.g., low overflight) he would need to first obtain permission from the Sanctuary superintendent. This authorization expires on April 7, 2004 and does not apply to any other NMS in the system.

Commercial entities proposing the dispersion of cremated human remains must apply for and receive a special use permit prior to initiating this activity within the boundaries of any National Marine Sanctuary except MBNMS, as described above. (When private individuals wish to scatter cremated human remains in a NMS other than the MBNMS, they may request an individual authorization, if available, of the EPA's general permit from the appropriate Sanctuary manager or superintendent on a case-by-case basis.)

#### Commercial Overflights in Restricted Zones

Within certain zones of MBNMS, Olympic Coast National Marine Sanctuary (OCNMS), Channel Islands National Marine Sanctuary, and the Gulf of the Farallones National Marine Sanctuary operating an aircraft below a minimum altitude is prohibited by Sanctuary regulations (15 CFR Part 922). The minimum altitude for the zones within all aforementioned Sanctuaries, with the exception of OCNMS, is 1,000 feet. The minimum altitude for the zones within OCNMS is 2,000 feet.

The NMSP has received applications for permits to fly below the minimum altitude for commercial purposes within the restricted zones of MBNMS. Examples of commercial activities that have been subject to special use permits in the past include the filming of television advertisements and documentaries. When conditioned so that impacts to Sanctuary resources are eliminated, these activities have been determined to qualify for special use permits. Conditions on the permits generally include, but are not limited to, limitations on the number of passes an aircraft can take in a particular location, requirements for monitors to be present during operations, and seasonal restrictions so as to avoid certain areas during particularly sensitive times of the year.

All Sanctuaries with overflight restrictions have received requests to fly below the minimum altitude for non-commercial purposes (scientific research or education). These activities are eligible for research or education permit categories permittable under each site's regulatory authority and do not require

the issuance of a special use permit.

Anyone wishing to operate an aircraft for commercial purposes below the designated altitude in any of the restricted overflight zones must apply for and receive a special use permit prior to conducting that activity.

#### The Placement and Subsequent Recovery of Objects Associated With Public Events on Non-Living Substrate

MBNMS has, in the past, issued special use permits to non-profit institutions and public entities to place temporary objects (e.g., marker buoys) on non-living portions of the seabed when that activity is associated with public events. Public triathlons and the California Chocolate Abalone dive are two such events that have been subject to special use permit requirements. Since the placement of objects on the seabed within most NMSs is prohibited by individual Sanctuary regulations, this activity usually requires a permit.

Conditions of special use permits for public events require that each object be placed on the seafloor in such a way as to not destroy, cause the loss of, or injure Sanctuary resources or qualities. The objects are required to be removed in a similar non-intrusive fashion after each event. In addition, the markers and other objects themselves are to be composed of substances that do not leach deleterious materials or other matter into the Sanctuary.

Special use permits are required for public events that involve the placement of objects on the seafloor in any National Marine Sanctuary. Anyone wishing to hold a public event that involves the placement of an object (or objects) on the seafloor of a National Marine Sanctuary must apply for and receive a special use permit prior to holding the event.

#### The Deposit and Immediate Recovery of Objects Related to Special Effects of Motion Pictures

The NMSP has received inquiries from motion picture companies seeking to deposit objects into a Sanctuary and immediately recover them for special effects. No special use permit has been applied for or issued for this type of activity to date. Sanctuary regulations generally prohibit the placement of objects on the seabed as well as the discharge of material or other matter into the Sanctuary. If the NMSP determines to allow this type of activity, persons proposing this activity would be required to prove to the NMSP that the objects being deposited would not injure, cause the loss of, or destroy any Sanctuary resource (e.g., are of a nature that would not cause harmful substances to leach into the Sanctuary, that the objects would be recovered from the Sanctuary immediately, and that the area of the seafloor where the object would be deposited is not sensitive to the proposed disturbance). In addition, Sanctuary staff would require that, if permitted, this type of activity is done at locations and during times of the year that are least likely to have sensitive Sanctuary resources in the vicinity of the disturbance.

Any individual or entity proposing to deposit any object into a National Marine Sanctuary related to special effects by the motion picture or other industry must apply for and receive a permit prior to conducting this activity within a National Marine Sanctuary.

## The Maintenance of Commercial Submarine Cables on or Beneath the Seafloor

The NMSP has issued two special use permits to allow telecommunications companies to maintain fiber optic cables beneath the seafloor within the Olympic Coast National Marine Sanctuary (two cables permitted in November of 1999) and Stellwagen Bank National Marine Sanctuary (one cable permitted in June of 2000). While the actual installation, \*35504 removal, and any necessary repair activities were authorized under the NMSP's regulatory authority, the continued presence of the cable buried beneath the surface of the seabed was allowed through a special use permit issued pursuant to section 310 of the NMSA. This activity will continue to be subject to the requirements of section 310 of the NMSA.

In a separate process, NOAA will continue to develop its policy on submarine cables within National Marine Sanctuaries, following up on the August 23, 2000, Advance Notice of Proposed Rulemaking (ANPR) on Installing and Maintaining Commercial Submarine Cables in National Marine Sanctuaries (65 FR 51264). The ANPR included a draft set of proposed principles for laying submarine cables in the marine and coastal environment. Through this separate process, NOAA will consider whether to issue regulations or a policy statement on submarine cables within Sanctuaries including whether the issuance of special use permits allowing the presence of submarine cables beneath or on the seafloor continues to be appropriate. Depending on the outcome of this process the NMSP may issue another Federal Register notice amending this one, as appropriate.

## Comments

NMSP is accepting comments on its use of the special use permit authority. NMSP is especially interested in comments that pertain specifically to the impacts of the aforementioned activities on Sanctuary resources. NMSP is also interested in any other comments on the subject matter addressed in this notice.

## Miscellaneous Requirements

### Paperwork Reduction Act

Notwithstanding any other provisions of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq., unless that collection of information displays a currently valid Office of Management and Budget (OMB) control number. Applications for the special use permits discussed in this notice involves a collection-of-information requirement subject to the requirements of the PRA. OMB has approved this collection-of-information requirement under OMB control number 0648-0141.

The collection-of-information requirement applies to persons seeking special use permits to conduct otherwise prohibited activities and is necessary to determine whether the proposed activities are consistent with the terms and conditions of special use permits prescribed by the NMSA. Public reporting burden for this collection of information is estimated to average twenty four (24) hours per response (application, annual report, and financial report), including the time for

reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. This estimate also includes the significant time that may be required should the applicant choose to prepare a draft of any documentation that may be required under the National Environmental Policy Act (NEPA), e.g., environmental impact statement or environmental assessment. If the applicant chooses not to prepare a draft of any NEPA documentation for the proposed activity, or if only minimal NEPA documentation is needed, the public reporting burden would be much less (approximately one hour for each response). If additional NEPA documentation is required and not prepared in draft by the permit applicant, NOAA would be required to prepare this documentation using its own staff and resources prior to NOAA taking final action on the application. As staff time and funding resources are limited, the preparation of complicated NEPA documents can significantly add to the time NOAA takes to review the application and take final action.

This may also significantly add to the costs incurred by the federal government in processing the special use permit applications and thus the cost to the applicant.

Send comments on the burden estimate or on any other aspect of the collection of information, and ways of reducing the burden, to NOAA and OMB (see ADDRESSES).

#### National Environmental Policy Act

NOAA has concluded that this action will not have a significant effect, individually or cumulatively, on the human environment. This action is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement in accordance with Section 6.05c3(i) of NOAA Administrative Order 216-6. Specifically, this action is a notice of an administrative and legal nature. Furthermore, individual permit actions by the NMSP will be subject to additional case-by-case analysis, as required under NEPA, and will be completed when those actions are proposed to be taken by NMSP in the future.

NOAA also expects that many of these individual actions will also meet the criteria of one or more of the categorical exclusions described in NOAA Administrative Order 216-6 because special use permits cannot be issued for activities that are expected to result in any destruction of, injury to, or loss of any Sanctuary resource. However, the special use permit authority may at times be used to allow activities that may meet the Council on Environmental Quality's definition of the term "significant" despite the lack of apparent environmental impacts (e.g., publicly controversial activities). In addition, NOAA may, in certain circumstances, combine its special use permit authority with other regulatory authorities to allow activities not described above that may result in environmental impacts to NMS resources and thus require the preparation of an environmental assessment or environmental impact statement. In these situations NOAA will ensure that the appropriate NEPA documentation is prepared prior to taking final action on a permit or making any irretrievable or irreversible commitment of agency resources.

Jamison S. Hawkins,

Deputy Assistant Administrator for Ocean Services and Coastal Zone Management.

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